

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH FOSTER BEY,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2003

No. 240140

Wayne Circuit Court

LC No. 74-000994

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a March 8, 2002, order granting defendant's motion for relief from judgment and resentencing pursuant to MCR 6.500 *et seq.* We reverse.

I

The question presented is whether a sentencing judge's expectation at the time of sentencing, that a defendant sentenced to life imprisonment will be paroled after a predictable determinate term of years served, renders the sentence invalid when parole does not occur as the judge anticipated. Under the recent ruling in *People v Moore*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 122367, issued June 24, 2003), we conclude that the sentence is not rendered invalid.

II

In 1974, defendant was charged with two counts of first-degree murder, MCL 750.316, for the shooting deaths of John Brown and Patricia Adams. A jury convicted defendant of two counts of second-degree murder, MCL 750.317. In July 1975, Wayne Circuit Court Judge Robert J. Colombo sentenced defendant to two concurrent terms of life imprisonment for the second-degree murder convictions. At sentencing, Judge Colombo commented that defendant would be eligible for parole within ten years and that, if defendant rehabilitated himself, he would not object to parole.

Defendant appeared before the parole board on five occasions, but the parole board had repeatedly declined to grant him parole. In October 2001, after serving twenty-six years in prison, defendant filed a motion for relief from judgment pursuant to MCR 6.508. Defendant

argued that his sentence was invalid because it was based on misinformation about the length of time defendant would serve. That is, the life sentence imposed by Judge Colombo in 1975 was based on the judge's intent that defendant serve at least ten years, but no more than seventeen years in prison. Defendant provided a handwritten letter from Judge Colombo,<sup>1</sup> indicating that he sentenced defendant to life sentences based on his belief that defendant would be considered for parole in ten years, and that he never intended for defendant to serve as much time as he had:

At the time of sentencing not only I, but the vast majority of Trial judges in the State of Michigan were aware that by imposing life sentences rather than determinative (sic) sentences of minimum and maximums, the Michigan Parole Board at that time was able to parole defendants who had made substantial progress toward rehabilitation upon completion of a term of 10 years. It was with that in mind that I imposed a sentence of Life for Second Degree Murder in the case of Mr. Foster and I publicly stated on the record that I was aware that he could be paroled in 10 years time by the Parole Board if he had rehabilitated himself.

The reason I did this was also to encourage Mr. Foster to take advantage of all the programs the Corrections Department had for self improvement which apparently Mr. Foster has done with outstanding success.

Unfortunately there has also been a huge change in the position of the Corrections Commissioner and the Parole Board during this length of time between my sentence and this date, and Mr. Foster is caught in the middle of it having served now over 27 years for a crime I never would have intended him to serve that long.

For the offenses in this case, and taking into consideration the facts in this case, and that the Jury considered the Charge of First Degree Murder, but nonetheless convicted the defendant Mr. Foster of 2 Counts of 2nd Degree Murder, a lesser and included offense of each crime of First Degree Murder, I would never have sentenced Mr. Foster to a term of more than two concurrent terms of 25 to 30 years because to do otherwise would have been Jury Nullification by Judicial Sentence. And in the year of 1975 that would have meant with then applied good time he would have served no more than 17 or so years in prison.

On March 8, 2002, the circuit court granted defendant's motion and ordered resentencing, concluding that defendant had satisfied the requirements of MCR 6.508. Relying largely on Judge Colombo's letter, the trial court ruled that defendant's sentence was invalid.

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<sup>1</sup> Judge Colombo had since retired.

### III

“A trial court’s grant of relief from judgment is reviewed generally for an abuse of discretion.” *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). However, whether the trial court has jurisdiction to order a resentencing is a question of law, which Court reviews de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997). While identifying a judge’s understanding of the law may involve a question of fact, whether that understanding misapprehends the law is a question of law, which this Court reviews de novo. *Moore, supra*, slip op at 7.

This case is governed by the Supreme Court’s recent decision in *Moore, supra*, issued after the trial court’s decision in this case and after this Court granted leave to appeal. “A trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid.” *Id.*, slip op at 6-7; see also MCR 6.429(A). A sentence is invalid when it is based on inaccurate information, if it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of the law, or when it conforms to local sentencing policy rather than individualized facts. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

In this case, as in *Moore*, the facts demonstrate no misunderstanding by Judge Colombo that entitles defendant to resentencing. A sentencing judge’s failure to accurately predict the actions of the Parole Board does not constitute a misapprehension of the law that renders a sentence invalid. *Moore, supra*, slip op at 8. In this case, as in *Moore*, defendant was eligible for parole consideration. Defendant’s sentence was valid. *Id.*, slip op at 9. The circuit court therefore lacked authority to resentence defendant. *Id.*, slip op at 9-10.

Defendant argues that his case is factually distinguishable from *Moore* because Judge Colombo expressed his intent that defendant actually *be paroled*, not just that the Parole Board *consider* whether to parole defendant. Defendant emphasizes that Judge Colombo stated that he never would have intended that defendant serve as long as he has and that the sentence defendant has served was never expected or intended.

We conclude that these factual distinctions do not alter the legal conclusion reached under *Moore*. Defendant’s sentence was not imposed under a misconception of the law as it existed at the time of his sentencing.

Reversed.

/s/ Kathleen Jansen  
/s/ Janet T. Neff  
/s/ Kirsten Frank Kelly